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7 *Attorneys for Petitioner and*
Real Party in Interest

8 SUPERIOR COURT OF THE STATE OF CALIFORNIA

9 COUNTY OF SAN FRANCISCO

11 **DEAN R. GRAFILO, DIRECTOR OF THE**
12 **DEPARTMENT OF CONSUMER**
13 **AFFAIRS, STATE OF CALIFORNIA,**

14 Plaintiff,

15 v.

16 **KAISER FOUNDATION**
17 **HOSPITALS/THE PERMANENTE**
18 **MEDICAL GROUP,**

19 Respondent,

20 **KIMBERLY KIRCHMEYER,**
21 **EXECUTIVE DIRECTOR, MEDICAL**
22 **BOARD OF CALIFORNIA,**

23 Real Party in Interest.

FILED
San Francisco County Superior Court
JUN 12 2019

CLERK OF THE COURT
BY: *[Signature]*
Deputy Clerk

CPF-19-516700

Case No.

**PETITION FOR ORDER TO SHOW
CAUSE AND ORDER COMPELLING
COMPLIANCE WITH
INVESTIGATIONAL SUBPOENA**

Date:

Time:

Dept: 302

Judge: Hon. Ethan P. Schulman

Trial Date:

Action Filed: June 12, 2019

24 Petitioner Dean R. Grafilo, Director of the Department of Consumer Affairs, State of
25 California (DCA), by his attorneys Xavier Becerra, Attorney General of the State of California,
26 and Carolyn Evans, Deputy Attorney General, alleges as follows:
27
28

1 1. Petitioner Dean R. Grafilo (Petitioner) is the duly appointed Director of the
2 Department of Consumer Affairs. He brings this action solely in his official capacity as Director.

3 2. The Department of Consumer Affairs of the State of California is a department within
4 the meaning of Government Code §§ 11180 *et seq.* Under Government Code §§ 11181 and
5 11182, the Director of the DCA is the head of the Department and has the authority to conduct
6 investigations, issue subpoenas, and take testimony in connection with matters within the
7 jurisdiction of the Department. The Director also has the power to delegate such authority.

8 3. Real Party in Interest Kimberly Kirchmeyer is the Executive Director of the Medical
9 Board of California (Medical Board or Board) which is a duly constituted government agency
10 within the DCA. The Medical Board is charged with the enforcement of the Medical Practice Act
11 (Business and Professions Code §§ 2000 *et seq.*) and with investigating complaints from
12 consumers, from other licensees, from healthcare facilities, or from the Board itself, that a
13 physician may be guilty of unprofessional conduct. (Business and Professions Code § 2220(a).)
14 This proceeding directly affects the interests of the Medical Board because the petition seeks to
15 enforce compliance with an investigational subpoena issued during an ongoing Medical Board
16 investigation of possible violations of the Medical Practice Act by its licensee Mary Kelly Sutton,
17 M.D. (Respondent)

18 4. The Director of the DCA has delegated to officers of the Medical Board, which is an
19 agency within the DCA, the authority to issue subpoenas under Government Code § 11182.

20 5. Michael Fielding Allen, M.D. holds a Physician's and Surgeon's Certificate issued by
21 the Medical Board, which permits him to engage in the practice of medicine and to issue
22 exemptions from mandatory vaccinations to qualifying patients.

23 6. By way of this petition, the Medical Board requests an order compelling Kaiser
24 Foundation Hospitals (KFH) to comply with an investigational subpoena for unredacted
25 vaccination exemptions and related information in their possession. As set forth in the
26 Declaration of Investigator Monica Peretto, filed herewith, KHF was duly served with the
27 investigational subpoena, but has advised that it will only comply with the subpoena pursuant to a
28 court order. As set forth in Ms. Peretto's declaration and the Declaration of James Nuovo, M.D.,

1 the records sought are relevant and necessary to the investigation of vaccination exemptions
2 issued by Mary Kelly Sutton, M.D.

3 7. On February 23, 2017, the Board received a complaint from the Assistant Chief of
4 Pediatrics at Kaiser, Roseville, stating that a Kaiser patient had been given an inappropriate
5 vaccine exemption letter by Dr. Sutton. On March 28, 2017, the complainant sent a copy of an
6 exemption letter issued by Dr. Sutton. The exemption stated that the (name redacted) child was a
7 patient under her care and that the child's physical condition and medical circumstances were
8 such that the child was "to have a lifelong medical exemption from all vaccines." Subsequently,
9 the complainant provided nearly identical additional vaccine exemptions issued by Dr. Sutton to
10 other school- aged children, including letters dated April 5, 2017, August 14, 2018, and October
11 12, 2018.

12 8. On February 15, 2019, an investigator for the Medical Board served a subpoena for
13 unredacted vaccination exemptions and related information in the possession of Kaiser
14 Foundation Hospitals.

15 9. On April 4, 2019, counsel for The Permanente Medical Group (TPMG) responded
16 that the requested documents and information would be provided if ordered to do so by a court
17 "and our client is willing to stipulate to the issuance of such an order." On May 16, 2019, counsel
18 advised that the exemptions are in the possession of TPMG and any order for production should
19 be directed to TPMG.

20 10. In support of this Petition for Order to Show Cause and Order Compelling
21 Compliance with Investigational Subpoena, Petitioner offers the Declaration of James Nuovo,
22 M.D. He is a board-certified physician in the field of Family Medicine. Dr. Nuovo has reviewed
23 the information obtained by the Board's investigation and has opined that the exemptions appear
24 to have been issued without a history and evaluation and that the exemptions do not demonstrate
25 a valid medical indication.

26 11. Pursuant to Government Code § 11186, venue lies in the County of San Francisco,
27 where the investigation was directed by the Office of the Attorney General, and pursuant to
28

1 §11188 this Court has the authority to issue an Order to Show Cause why TPMG should not be
2 ordered to comply with the investigational subpoenas served upon them.

3 12. On June 10, 2019, at 3:02 p.m., counsel for TPMG was given notice of the ex parte
4 application for an Order to Show Cause.

5 WHEREFORE, pursuant to Government Code §§ 11186-88, Petitioner respectfully
6 requests that this Court issue an order requiring TPMG to appear before this Court and to show
7 cause why it has failed to comply with the investigational subpoena served on it and, upon failure
8 to show cause, to enter an order:


9 1. Requiring TPMG to produce the records sought by the investigational subpoena to
10 Investigator Monica Peretto within 15 days of the hearing on this petition; and,

11 2. Taking such further action as the Court deems appropriate in the interests of justice.

12 Dated: June 11, 2019

Respectfully Submitted,

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14 XAVIER BECERRA
Attorney General of California
15 MARY CAIN-SIMON
Supervising Deputy Attorney General

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17 
18 CAROLYNE EVANS
Deputy Attorney General
19 *Attorneys for Petitioner and*
20 *Real Party in Interest*
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FILED
FOR COURT USE ONLY
San Francisco County Superior Court
JUN 12 2019
CLERK OF THE COURT
BY: *[Signature]*
Deputy Clerk

ATTORNEY OR PARTY WITHOUT ATTORNEY (Name, State Bar number, and address):
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ATTORNEY FOR (Name): Petitioner and Real Party in Interest

SUPERIOR COURT OF CALIFORNIA, COUNTY OF

STREET ADDRESS: 400 McAllister

MAILING ADDRESS:

CITY AND ZIP CODE: San Francisco, CA 94102

BRANCH NAME:

CASE NAME:

Dean R. Grafilo, petitioner vs. Kasier Permanente, et al, Respondents

CIVIL CASE COVER SHEET

☐ **Unlimited** (Amount demanded exceeds \$25,000) ☐ **Limited** (Amount demanded is \$25,000 or less)

Complex Case Designation

☐ **Counter** ☐ **Joinder**

Filed with first appearance by defendant (Cal. Rules of Court, rule 3.402)

CASE NUMBER:

JUDGE: Ethan Schulman

DEPT: 30

Items 1–6 below must be completed (see instructions on page 2).

CPF-19-516700

1. Check **one** box below for the case type that best describes this case:

Auto Tort

☐ Auto (22)
☐ Uninsured motorist (46)

Other PI/PD/WD (Personal Injury/Property Damage/Wrongful Death) Tort

☐ Asbestos (04)
☐ Product liability (24)
☐ Medical malpractice (45)
☐ Other PI/PD/WD (23)

Non-PI/PD/WD (Other) Tort

☐ Business tort/unfair business practice (07)
☐ Civil rights (08)
☐ Defamation (13)
☐ Fraud (16)
☐ Intellectual property (19)
☐ Professional negligence (25)
☐ Other non-PI/PD/WD tort (35)

Employment

☐ Wrongful termination (36)
☐ Other employment (15)

Contract

☐ Breach of contract/warranty (06)
☐ Rule 3.740 collections (09)
☐ Other collections (09)
☐ Insurance coverage (18)
☐ Other contract (37)

Real Property

☐ Eminent domain/Inverse condemnation (14)
☐ Wrongful eviction (33)
☐ Other real property (26)

Unlawful Detainer

☐ Commercial (31)
☐ Residential (32)
☐ Drugs (38)

Judicial Review

☐ Asset forfeiture (05)
☐ Petition re: arbitration award (11)
☐ Writ of mandate (02)
☐ Other judicial review (39)

Provisionally Complex Civil Litigation (Cal. Rules of Court, rules 3.400–3.403)

☐ Antitrust/Trade regulation (03)
☐ Construction defect (10)
☐ Mass tort (40)
☐ Securities litigation (28)
☐ Environmental/Toxic tort (30)
☐ Insurance coverage claims arising from the above listed provisionally complex case types (41)

Enforcement of Judgment

☐ Enforcement of judgment (20)

Miscellaneous Civil Complaint

☐ RICO (27)
☐ Other complaint (not specified above) (42)

Miscellaneous Civil Petition

☐ Partnership and corporate governance (21)
☒ Other petition (not specified above) (43)

2. This case ☐ is ☒ is not complex under rule 3.400 of the California Rules of Court. If the case is complex, mark the factors requiring exceptional judicial management:

- a. ☐ Large number of separately represented parties d. ☐ Large number of witnesses
b. ☐ Extensive motion practice raising difficult or novel issues that will be time-consuming to resolve e. ☐ Coordination with related actions pending in one or more courts in other counties, states, or countries, or in a federal court
c. ☐ Substantial amount of documentary evidence f. ☐ Substantial postjudgment judicial supervision

3. Remedies sought (check all that apply): a. ☐ monetary b. ☒ nonmonetary; declaratory or injunctive relief c. ☐ punitive

4. Number of causes of action (specify):

5. This case ☐ is ☒ is not a class action suit.

6. If there are any known related cases, file and serve a notice of related case. (You may use form CM-015.)

Date: June 11, 2019

Carolynne Evans, Deputy Attorney General

(TYPE OR PRINT NAME)

(SIGNATURE OF PARTY OR ATTORNEY FOR PARTY)

NOTICE

- Plaintiff must file this cover sheet with the first paper filed in the action or proceeding (except small claims cases or cases filed under the Probate Code, Family Code, or Welfare and Institutions Code). (Cal. Rules of Court, rule 3.220.) Failure to file may result in sanctions.
- File this cover sheet in addition to any cover sheet required by local court rule.
- If this case is complex under rule 3.400 et seq. of the California Rules of Court, you must serve a copy of this cover sheet on all other parties to the action or proceeding.
- Unless this is a collections case under rule 3.740 or a complex case, this cover sheet will be used for statistical purposes only.

Page 1 of 2